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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1244-96

A. T. GORDON, et al.,
Petitioners,
vs.
GRANVILLE H. LANCE, et al.,
Respondents.

BRIEF AMICI CURIAE ON BEHALF OF CALIFORNIA TAXPAYERS' ASSOCIATION IN SUPPORT OF THE POSITION OF PETITIONERS

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BRIEF AMICI CURIAE ON BEHALF OF CALIFORNIA TAXPAYERS' ASSOCIATION IN SUPPORT OF THE POSITION OF PETITIONERS

This brief is filed with the written consent of all of the parties, pursuant to Rule 42 of the Rules of the Supreme Court of the United States. It is in support of the position of petitioners upholding the validity of the provisions of the West Virginia Constitution and statutes which prohibit a political subdivision of West Virginia from issuing general obligation school or municipal bonds without the approval of more than a simple majority of the votes cast

by the qualified electors of the political subdivision voting for or against such bonds.

INTEREST OF CALIFORNIA TAXPAYERS' ASSOCIATION

California Taxpayers' Association is a nonprofit corporation organized under the laws of the State of California for the primary purpose, as stated in its Articles of Incorporation,

> "To bring about through nonpartisan and nonpolitical means, in the interest of all taxpayers in the State of California, by mutual effort, the greatest possible economies consistent with efficiency in the collection and expenditure of public monies to the end that taxes, in the State of California, and in the counties, cities, and other political subdivisions of said state, shall be reduced."

Several cases pending before the Supreme Court of the State of California present the issue of the validity, under the Equal Protection Clause of the United States Constitution, of a provision of the California Constitution (Article XI, section 18) which prohibits any California city, county or school district from issuing general obligation bonds without the approval of two thirds of the voters in the city, county or school district voting at an election held for the purpose of approving such bonds.*

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*These cases are: *Adams v. Mihaly*, Docket No. S F 22707; *Alhambra City High School District v. Mize*, Docket No. L A 29707; *Alhambra City School District v. Mize*, Docket No. L A 29706; *Foytik v. Aronson*, Docket No. Sac 7855; *Larez v. Shannon*, Docket No. Sac 7854; *Pasadena Unified School District v. Mize*, Docket No. L A 29708; *Rosemead School District v. Mize*, Docket No. L A 29709; and *Westbrook v. Mihaly*, Docket No. S F 22706.

Amici Curiae have filed a brief in the California Supreme Court on behalf of California Taxpayers' Association supporting the validity of that provision and are filing this brief because this Court's decision in the case at bar should be dispositive of the issue before the California Court.

SUMMARY OF ARGUMENT

The principle of checks and balances is the cornerstone of American government. It is embodied in the constitutions of the states as well as the Federal Constitution. These constitutions include many checks which help to deter action in areas where restraint is needed. The subject at hand—long-term debt—is one in which reasonable caution and restraint are especially needed. Unlike most legislative action, a decision to incur long-term bonded indebtedness is irreversible. Even if the bonds subsequently turn out to have been ill-conceived, they cannot be amended or repealed (U.S. Const. Art. I, sec. 10).

The requirement that school or municipal bonds be approved by more than a simple majority of the voters does not restrict voting to certain classes of voters, nor does it present any form of "invidious discrimination" among voters. It is a reasonable regulation which serves a compelling state interest. It protects present and future taxpayers in the assumption of long-term obligations which irrevocably mortgage future taxes and affect the ability of subsequent majorities and minorities to meet what may turn out to be the more urgent requirements of the future.

Where, as here, the compelling tate interest is shown and there is no discrimination b sed on race, sex, religion, property ownership, wealt , occupation or residence, the determination of the n d for and efficacy of the particular requirement in pr ecting the compelling state interest is for the people o their legislature—not for the courts. The validity of the requirement is established by showing that it has a r tional relationship to a state's compelling interest in the continued financial integrity of its political subdivisions and the protection of the interests of future majorities nd minorities within those subdivisions.

ARGUMENT

I. THE REQUIREMENT THAT LONG- ERM BONDED INDEBTEDNESS BE APPROVED BY MOR THAN A SIMPLE MAJORITY SERVES A COMPELLING TATE INTEREST AS A REASONABLE REGULATION OF T E ASSUMPTION OF FINANCIAL BURDENS WHICH BIN ALL OF THE PEOPLE FOR LONG FUTURE PERIODS.

Most legislative action may be adopted by a simple majority. But it is also subject to rrection by repeal or modification by a simple majority Bonds are not. They bind the people, including future m jorities, to tax obligations extending over many years, nd the United States Constitution prevents their repea or amendment (U.S. Const., Art. I, sec. 10).

The issue in the case at bar is a narrow one. It has nothing to do with the representati or the qualifications of voters. It is concerned only wi the requirement of approval, by more than a simple m ority, of the issuance

of long-term general obligation bonds which irreversibly commit future taxes and finances, regardless of the will of the voters during the period of the obligation.

The mortgaging, irreversibly, of future taxes—affecting as it does the ability of the municipality or school district to preserve its credit and meet its future needs—is a matter of unusual seriousness. The taxpayers of future years have no voice in today's decision to incur long-term bond indebtedness, but they are forbidden by Article I, section 10 of the Constitution of the United States from repealing the bonds or amending the indebtedness. Requirements such as those in California and West Virginia that such bonds be approved by more than a simple majority were designed to protect those future taxpayers from what may turn out to have been the short-sighted wishes of today's majority.

Although future taxpayers cannot have a direct voice in incurring the debt, their interests are protected by imposing upon the bond proponents a burden of persuading more than a simple majority of present voters to approve the bonds and incur the long-term tax burdens. The purpose of protecting future taxpayers has been recognized by the California Supreme Court as the basis for the provision in the California Constitution requiring that municipal bonds be approved by more than a simple majority:

> "In the constitutional provision under consideration the framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which *debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on*

> *into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers.* It was to prevent this abuse that the constitutional provision was enacted" (*McBean v. City of Fresno* (1896) 112 Cal. 159, 164, 44 Pac. 358, 359; emphasis added).

To similar effect, see:

Book v. Earl (1885) 87 Mo. 246, 251-252;

Shonk Land Co. v. Joachin (1924) 96 W.Va. 708, 123 S.E. 444, 446-447.

Other measures which cannot be corrected by amendment or repeal frequently require approval by vote of more than a simple majority. For example, 46 states require more than a simple majority vote to convict an impeached public official (*Index Digest of State Constitutions,* Legislative Drafting Research Fund, Columbia University (2 Ed. 1959) pp. 538-539).[1] Likewise, 43 states require a vote of more than a simple majority for a legislature to expel one of its members (*Index Digest of State Constitutions,* Legislative Drafting Research Fund, Columbia University (2 Ed. 1959) pp. 650-651).[2] In such situations a heavier vote is required because of the nature and effect of the action. Like the approval of municipal and school debt obligations, the action has a long-term effect and cannot be changed by a simple amendment or repeal.

In none of the foregoing situations, including the case at bar, is the vote of any individual debased or diluted.

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[1]These include West Virginia (W.Va.Const., Art. IV, § 9) and California (Cal.Const., Art. IV, § 18).

[2]These include West Virginia (W.Va.Const., Art. VI, § 25) and California (Cal. Const., Art. IV, § 5).

Everyone who is qualified to vote is entitled to vote but, because of the nature and effect of the action, more people are required to vote for a proposition before it can become effective.

II. A STATE HAS THE RIGHT TO REGULATE THE APPROVAL OF LONG-TERM SCHOOL AND MUNICIPAL DEBT OBLIGATIONS BY REASONABLE REGULATIONS WHICH SERVE A COMPELLING STATE INTEREST.

Where, as in the case at bar, there is no question of the qualification of the voters and the vote of every qualified voter is counted, there is no requirement in the Federal Constitution that the vote of a simple majority must prevail. Indeed, this Court has recognized that a majority vote is not sacrosanct. In *Fortson v. Morris* (1966) 385 U.S. 231, it held that a candidate for governor who had received neither a majority nor a plurality of the votes cast in the gubernatorial election could nevertheless be selected as governor without violating the equal protection clause. The Court upheld a provision of the Georgia Constitution which permitted the governor to be chosen by the legislature from the two candidates receiving the highest vote in the event no candidate received a majority at the polls.

In *Dusch v. Davis* (1967) 387 U.S. 112, the Court found no violation of the equal protection clause in the election of members of a city council who, though elected at large, were required to be residents of particular districts which were of unequal population. The residence requirement was upheld as a proper means

> "to reflect a detente between urban and rural communities that may be important in resolving the

complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside" (387 U.S. 117).

The court below in the case at bar placed great stress on *Kramer v. Union School District* (1969) 395 U.S. 621, and *Cipriano v. City of Houma* (1969) 395 U.S. 701[3], but neither of those cases was concerned with a requirement that bonds be approved by more than a simple majority. Moreover, in each case, the Court recognized that even exclusions from the right to vote could be supported by "a compelling state interest" (395 U.S. 627; 395 U.S. 704). In the *Kramer* case, there was no showing of a compelling state interest which would justify restricting the vote at school district elections to property taxpayers and parents in disregard of the interests of other citizens in the quality of education. In the *Cipriano* case, the Court held unconstitutional a statute which denied to a user of municipal utility services the right to vote on municipal utility bonds. There was no showing of a compelling state interest which justified limiting the vote to property owners and disregarding the concern of those who use and pay for utility services.

In determining whether there is sufficient state interest to justify the regulations involved in the case at bar, this Court need not attempt to lay down a rule which will cover all instances in which states require approval of legislative action by more than a simple majority. There may be insufficient state interest to justify such a requirement with respect to some legislative measures which

[3]See *Lance v. Board of Education of the County of Roane* (1969) ..... W.Va. ....., 170 S.E.2d 783, 789.

are subject to amendment or repeal. For example, in *Rimarcik v. Johansen* (D.Minn. February 4, 1970) ..... F.Supp. ..... [38 U.S. Law Week 2453], a three-judge district court held invalid a Minnesota requirement that an amendment to a city charter be approved by a 55 per cent majority of the voters. The adoption of a charter amendment was not irreversible; it was simply an exercise of legislative power no different from most legislation. Consequently, the court found no compelling state interest which would justify the requirement. It emphasized, however, that

> "We do not pass on the question * * * of whether under a different state constitutional or statutory scheme there may exist a compelling state interest justifying a requirement for more than a majority vote" (..... F.Supp. .....).

This Court has pointed out that in election cases, the equal protection clause "does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems" (*Avery v. Midland County* (1968) 390 U.S. 474, 485). Yet this Court is now asked to hold that the equal protection clause—which itself had as a basic purpose the protection of the rights of minorities (*Yick Wo v. Hopkins* (1886) 118 U.S. 356, 369-370)—gives to a simple majority of the voters the absolute constitutional right to bind the rest (and even the majorities in succeeding years) for long future periods.

III. THE REQUIREMENT THAT SCHOOL AND MUNICIPAL BONDS BE APPROVED BY MORE THAN A SIMPLE MAJORITY DISENFRANCHISES NO ONE, INVOLVES NO DISCRIMINATION ON ACCOUNT OF RACE, SEX, RELIGION, PROPERTY OWNERSHIP, WEALTH, OCCUPATION OR RESIDENCE, AND CONSTITUTES A REASONABLE MEANS OF PROTECTING PRESENT AND FUTURE CITIZENS IN THE ASSUMPTION OF LONG-TERM OBLIGATIONS. THE BURDEN OF ESTABLISHING THE INVALIDITY OF THAT REQUIREMENT IS ON THOSE WHO ATTACK IT. IN ANY EVENT, THE REQUIREMENT MEETS THE EXACTING STANDARD OF SERVING A COMPELLING STATE INTEREST.

The requirement that bonds be approved by more than a simple majority of the voters does not discriminate among voters because of race, sex, religion, property ownership, wealth, occupation or residence. Unlike the laws involved in *Kramer v. Union School District* (1969) 395 U.S. 621, and *Cipriano v. City of Houma* (1969) 395 U.S. 701, it does not restrict voting on bond issues to certain classes of voters. Where, as here, there is no exclusion from voting, or invidious discrimination among voters, the burden is upon those who attack the validity of the provision in question (*McDonald v. Board of Election* (1969) 394 U.S. 802, 807-809; *Kramer v. Union School District* (1969) 395 U.S. 621, 626-627, footnote 6).

McDonald v. Board of Election (1969) 394 U.S. 802, upheld a voting statute under which absentee ballots were available to certain voters but not to persons who were unable to vote at their polling places because they were in jail awaiting trial and lacked sufficient funds to post bail. This Court applied the traditional standard of determining validity—whether the statute bore a rational relationship to a legitimate state end (394 U.S. 809)—

because the statute did not discriminate on the basis of wealth or race and did not deny anyone the right to vote (394 U.S. 807-808).

Regardless, however, of which basic standard is applicable in the case at bar, a state has a compelling interest in protecting its present and future citizens in assuming long-term obligations and has a right to adopt reasonable regulations to protect that interest.

Once the question of whether a regulation serves a compelling state interest has been determined, the courts are ill-equipped to decide whether the particular regulation is the most appropriate method of serving that interest. It is sufficient that there is a rational basis for the decision of the people in such states as West Virginia and California that the compelling state interest is best served by requiring the vote of more than a simple majority before a political subdivision may irreversibly mortgage future finances and bind future taxpayers.

In this regard, it is not for the courts to set aside a particular statute merely because that statute may not solve all of the problems which might have been solved by different provisions. A state

> "need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked" (*McDonald v. Board of Election* (1969) 394 U.S. 802, 809).[4]

The requirement of approval of general-obligation bonds by more than a simple majority is much less restrictive of

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[4]Other cases to the same effect include *Roschen v. Ward* (1929) 279 U.S. 337, 339; *Williamson v. Lee Optical Co.* (1955) 348 U.S. 483, 489; *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35, 50-51.

the ability of local government to raise money for public purposes than other measures—unquestionably constitutional—which might be devised to protect a state's compelling interest. For example, a state could establish a limitation, expressed in either dollars or percentage of assessed valuation, on the maximum indebtedness permitted to be incurred by a municipality—a measure which would leave local governments with far less flexibility than the requirement that bonds be approved by greater than a simple majority.[5] Similarly, a state could require that bonds be approved by a simple majority of all the registered voters in the district (see *Clay v. Thornton* (1969) ..... S.C. ....., 169 S.E.2d 617, appeal dismissed for want of a substantial Federal question sub nom. *Turner v. Clay* (1970) ..... U.S. ..... [25 L.Ed.2d 40]). Such a requirement would make bond approvals more difficult than the provisions involved in the case at bar. Indeed, the Federal Constitution would not prevent a state from flatly forbidding municipalities or school districts from issuing general obligation bonds.

Once the issue is brought down to a determination of the efficacy of a particular regulation, that issue is primarily for the people or their legislature. It is not for the courts to override the decision of the people where (a) there is no discrimination based on race, religion, sex, residence, wealth, occupation or property ownership, and

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[5]Such a limitation was considered by the framers of the California constitutional requirement of approval by more than a simple majority. It was rejected because of its inflexibility; such a limitation would prevent a municipality or school district from incurring necessary indebtedness in the event of a flood or other emergency (*Debates & Proceedings of the Constitutional Convention of the State of California of 1878-1879*, pp. 178, 625, 1068-1069, 1382-1385).

(b) the regulation has a rational relationship to the compelling state interest to be promoted and preserved. Here, there is no invidious discrimination. The requirement of more than a simple majority has a rational relationship to the continued financial integrity of a state's political subdivisions and the protection of future majorities and minorities within those subdivisions.

IV. THE DECISION OF THE COURT BELOW FINDS NO SUPPORT IN ANY OF THE DECISIONS OF THIS COURT.

The irreversible long-term effect of municipal and school bonds distinguishes the case at bar from all cases in which this Court has considered the equal protection clause in the context of voting.

The case at bar does not present any problem of equal representation in the legislature. Voting on bond issues is not restricted to certain classes of voters. Every qualified voter is entitled to vote on a bond issue. He has the same freedom of choice as every other voter.

In *Baker v. Carr* (1962) 369 U.S. 186, the Court held that the question of whether a state legislature is properly apportioned raises justiciable constitutional issues. The decisions in *Reynolds v. Sims* (1964) 377 U.S. 533; *WMCA, Inc. v. Lomenzo* (1964) 377 U.S. 633; *Maryland Committee v. Tawes* (1964) 377 U.S. 656; *Davis v. Mann* (1964) 377 U.S. 678; *Roman v. Sincock* (1964) 377 U.S. 695; and *Lucas v. Colorado Gen. Assembly* (1964) 377 U.S. 713, held that seats in both houses of bicameral state legislatures must be apportioned according to population. *Wesberry v. Sanders* (1964) 376 U.S. 1, and *Kirkpatrick*

v. Preisler (1969) 394 U.S. 526, applied this apportionment rule to Congressional districts, *Avery v. Midland County* (1968) 390 U.S. 474 applied it to units of local government, and *Hadley v. Junior College District of Metropolitan Kansas City* (1970) .....U.S. ..... [40 L.Ed.2d 45] applied it to single-purpose entities of local government. Legislative apportionment is not at issue in the case at bar.

In *Gray v. Sanders* (1963) 372 U.S. 368, the Court held unconstitutional the "county-unit" voting system of Georgia, in which candidates for state and federal elective offices were chosen by an electoral system in which each county had the same number of votes, regardless of population. No such voting system is at issue in the case at bar; bond propositions are subject to direct voting by the electorate, and an individual's vote is not constricted or amplified by reason of his place of residence.

The rule of *Gray v. Sanders* was applied by the New Mexico Supreme Court in *State ex rel. Witt v. State Canvassing Board* (1968) 78 N.M. 682, 437 P.2d 143. The New Mexico court struck down as unconstitutional a state requirement that proposed constitutional amendments be approved by two thirds of the voters in every county. This decision rested not on any alleged unconstitutionality of requirement of more than a simple majority vote, but on the ground that voters in less populous counties were given greater voting power than voters in more heavily populated counties, in violation of the rule of *Gray v. Sanders*. The New Mexico constitutional amendment procedures would have been declared unconstitutional even if only a simple majority was required in every county.

Harper v. Virginia Bd. of Elections (1966) 383 U.S. 663, held that Virginia's poll tax requirement violated the equal protection clause by discriminating among voters on the basis of economic status. No such economic discrimination is involved in the case at bar.

In *Kramer v. Union School District* (1969) 395 U.S. 621 (discussed supra, pp. 8, 10), voting at school district meetings had been restricted to property taxpayers or parents of school children in disregard of the interests of other citizens in the quality of education. In *Cipriano v. City of Houma* (1969) 395 U.S. 701 (discussed supra, pp. 8, 10), voting on municipal utility bond issues had been restricted to property taxpayers in disregard of the interests of those who used and paid for utility service. In *Carrington v. Rash* (1965) 380 U.S. 89, the State of Texas had denied the franchise to military personnel stationed in the State. All three cases held the denial of the franchise unconstitutional. These decisions do not apply to the case at bar; here no segment of the population has been unconstitutionally denied the franchise, and all qualified voters were permitted to vote on the bond issues.

These decisions have no bearing on the question of whether a state may require approval of municipal and school bonds by more than a simple majority when those bonds will bind all of the people for long future periods. To ignore West Virginia's compelling state interest in protecting present and future citizens in the assumption of long-term obligations would indeed "require that a uniform straitjacket bind citizens in devising mechanisms of local government" (*Avery v. Midland County* (1968) 390 U.S. 474, 485).

CONCLUSION

Most action can be approved by a simple majority. It can also be amended or repealed by a majority if the action turns out to be unwise or its burdens too great. This is not true of bonds. When they are approved by the voters, they do not merely bind the people for the day or the year—they impose a burden on the people for 10, 15 or 20 years which no future majority—of even 100 per cent—can change. The requirement that bonds be approved by more than a simple majority serves the purpose of protecting future majorities over long periods of time. The requirement serves a compelling state interest. It denies no one the right to vote and to have his vote counted equally with all others. It denies no one the equal protection of the laws.

Respectfully submitted,

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BRIEF

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On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1244

A. T. GORDON, et al.,
Petitioners,
vs.
GRANVILLE H. LANCE, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA

At the present time there are seven original proceedings and one appellate proceeding pending in the Supreme Court of the State of California each involving a petition for a writ of mandate seeking to

have declared invalid as being violative of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States the provisions of Section 18 of Article XI of the Constitution of the State of California, which requires a two-thirds affirmative vote of those voting on a proposition to authorize the incurrence of a bonded indebtedness by local subdivisions of the state.[1] Section 18 of Article XI reads as follows:

> "Sec. 18. No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary notwithstanding, when two or more propositions for incurring any indebtedness of liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when two-thirds of the qualified

[1]The two-thirds vote requirement of Section 18 of Article XI and the three-fifths and 60 percent vote requirements of the Constitution and statutes of the State of West Virginia and all requirements for more than a simple majority vote are herein referred to as the extra-majority voting requirement.

electors, voting on any one of such propositions, vote in favor thereof, such proposition shall be deemed adopted."

The eight proceedings are calendared for hearing before the Supreme Court of the State of California on May 15, 1970.

The City and County of San Francisco is involved in two of the proceedings, S.F. 22706, Westbrook, et al. v. Mihaly, et al., and S.F. 22707, Adams v. Mihaly, et al., by reason of the failure of two bond proposals, one for school purposes and one for recreation purposes, to receive the two-thirds vote required by Section 18 of Article XI at an election held in the City and County on November 4, 1969. Each proposal received a majority vote. The petitioners in S.F. 22706 are parents of children who it is alleged would have benefited by the passage of the bond proposals, and the petitioner in S.F. 22707 is a registered voter who filed a petition on behalf of himself and all other registered voters who voted affirmatively on the bond proposals. The respondents in each proceeding are Emmery Mihaly, Registrar of Voters of the City and County, Robert J. Dolan, Clerk of the Board of Supervisors of the City and County, and Nathan B. Cooper, Controller of the City and County.

The petitioners in each proceeding allege that the two-thirds vote requirement of Section 18 of Article XI violates the Equal Protection Clause of the 14th Amendment of the United States Constitution and pray that the Supreme Court of the State of California declare that this voting requirement be held

invalid and unconstitutional and that a writ of mandate issue commanding the respondent officials of the City and County to take official actions leading to the issuance and sale of the bonds on the basis that they were authorized by the electorate by a majority vote.

The Constitution and statutes of the State of West Virginia provide for a three-fifths vote requirement for the incurrence of bonded indebtedness and a separate 60 percent vote requirement to make an additional tax levy to retire the bonds. The one election held under the provisions of Section 18 of Article XI of the California Constitution both authorizes the incurrence of the bonded indebtedness and provides for the levy of a tax to retire the bonds. However, the basic issue involved in the proceedings now pending in the Supreme Court of the State of California is identical to the basic issue involved in the proceeding before this Court, namely, the constitutionality of an extra-majority voting requirement to authorize the incurrence of bonded indebtedness by political subdivisions of the state under the Equal Protection Clause of the 14th Amendment of the Constitution of the United States, and this brief is directed to this issue.

The provisions of Section 18 of Article XI requiring a two-thirds vote to authorize the incurrence of bonded indebtedness by local subdivisions of the state was part of the Constitution of the state as adopted in 1879. On the ballot at the general statewide election held in California on November 8, 1966, there appeared Proposition 4, a proposition to amend Section 18 of Article XI to provide that instead of a two-

thirds vote to incur an indebtedness, any local general obligation bonds for library purposes or public school purposes could be approved by 60 percent of the qualified voters voting on such proposition. This liberalization proposition was defeated by a majority vote of the electorate of the state and also by a majority vote of the electorate of the City and County of San Francisco. (See page 28, "California Statement of Vote and Supplement, November 8, 1966 General Election," published by Frank M. Jordan, Secretary of State, Appendix A.)

The interest of the City and County of San Francisco is in the preservation of the inherent and sovereign right of the people of the State of California, including the people of the City and County of San Francisco, to thus control the public indebtedness of the local subdivisions of the state in their fundamental law, in the preservation of the fiscal integrity of the state and its local subdivisions, and also in the consequences that the decision of this Court in the proceeding before it could have on approximately 300 other provisions contained in the Constitution and statutes of the State of California and the Charter of the City and County of San Francisco requiring more than a majority vote by the electorate or legislators to effectuate particular legislative or governmental actions.

The City Attorney of the City and County of San Francisco is authorized to file this brief on behalf of the City and County under the following provision of Section 26 of the Charter of the City and County (Appendix B):

"The city attorney must represent the city and county in all actions and proceedings in which it may be legally interested, . . ."

SUMMARY OF ARGUMENT

The one man, one vote concept has no application in this case. The Court below erroneously concluded that the concept was a principle of law to be applied in voting cases without qualification or exception and basically decided the case on this premise contrary to this Court's careful and discriminating utilization of the concept and its admonitions as to particular applications of its general pronouncements.

The cases wherein this Court applied the concept or has otherwise invalidated voting laws on equal protection grounds are completely distinguishable factually, politically and inherently. The extra-majority voting requirement is the most sanctioned and widely-used mechanism of government in use in the United States to guard against impulsive, precipitate or improvident governmental administrative or legislative action. It has never, except in the decision of the Court below, been either politically or judicially considered to constitute invidious discrimination violative of the Equal Protection Clause nor does it in fact invidiously discriminate against persons in violation of that Clause. It is a rational and wise method of governmental control by the people of the state within their sovereign powers of a governmental matter that vitally affects the fiscal and economic interests and

welfare of the state and it would satisfy a compelling state interest test if this were a case where such justification would be necessary. However, this is not such a case but rather, one where the presumption principle of itself is sufficient to sustain the constitutionality of the subject constitutional and statutory provisions.

ARGUMENT

I

THE EXTRA-MAJORITY VOTE REQUIREMENT IS ENGRAINED IN THE GOVERNMENTAL STRUCTURE OF THE UNITED STATES. IT HAS BEEN UNIVERSALLY SANCTIONED AND ENFORCED BY THE COURTS THROUGHOUT THE UNITED STATES.

The extra-majority vote requirement is the most politically and judicially sanctioned and widely used mechanism of government in use in the United States to check precipitate or improvident governmental action. As well stated by the Supreme Court of the State of Idaho in the recently decided case of *Bogert v. Kinzer* (Feb. 17, 1970), 465 P 2d 639, which sustained the constitutionality of the provisions of the Constitution and statutes of the state which authorized the issuance of general obligation bonds by subdivisions of government only upon the assent of two-thirds of the qualified electors voting at an election held for that purpose:

> "We do not believe that the theory of 'one man, one vote,' as discovered in the Equal Protection Clause, militates against and prohibits the continuation of a political theory which lies at the

> foundation of our government, which, simply stated, is, a consensus amounting to more than a simple majority is not only desirable but necessary at certain times and in certain circumstances.";

and in *Duncan v McCall,* 139 US 449, 461 (1891):

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, national and state, have been limited by written Constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

The extent of the permeation and engrainment in our governmental structure of the minority right to defeat governmental action or legislation may be in part demonstrated by the rights so provided in six provisions of our United States Constitution illustrated by the two-thirds vote requirement of Section 2(2) of Article II for the ratification of treaties by the Senate, 20 provisions of the Constitution of the State of California illustrated by Section 8 of Article IV requiring a two-thirds vote by the Legislature for the passage of emergency measures, Section 7½ (6) of Article XI requiring a two-thirds vote of the

electorate to surrender and annul a county charter, and Section 2 of Article XI requiring a two-thirds vote of the electorate to remove a county seat, 20 provisions of the Charter of the City and County of San Francisco illustrated by Section 16 requiring a three-fourths vote to adopt an emergency measure, and more than 200 state statutory provisions illustrated by Section 32243 of the Health and Safety Code requiring a two-thirds vote of the electorate to approve a special assessment in a hospital district and Section 33366 requiring a two-thirds vote of a board of supervisors to adopt a redevelopment plan when there has been an unfavorable recommendation by a planning commission.

A minority vote provision which lies at the very heart of our governmental system and the separation of powers it envisages which is common to the government of the United States, the State of California, the City and County of San Francisco and to governments throughout the United States, is the minority right to defeat passage of legislation over an executive veto found in the two-thirds vote requirement to override contained in Section 7 of Article I of the United States Constitution, Section 10 of Article IV of the Constitution of the State of California, and Section 14 of the Charter of the City and County of San Francisco. To blindly extend the one man, one vote concept to votes, per se, as was done in the Court below, would be completely destructive of this generally prevailing governmental system as if only a majority vote could be required, the chief executives' participa-

tion in the law-making process would be completely nullified.

The political acceptability of the extra-majority requirement had been universally sanctioned and judicially enforced by the Courts of this country prior to the decision in the Court below, and since that decision in the case of *Bogert v. Kinzer, supra.* The following is only a partial list of such decisions: *Jarrolt v. City of Moberly,* 103 US 580 (1881); *San Francisco Gas Co. v. Brickwedel,* 62 Cal. 641 (1882); *Carroll County v. Smith,* 111 US 556 (1884); *Hill v. City of Memphis,* 134 US 198 (1890); *Bradford v. City and County,* 112 Cal 537, 41 P 912 (1896); *Montgomery County Fiscal Court v. Trumble,* 47 SW 773 (1898); *Law v. San Francisco,* 144 Cal 384, 77 P 1014 (1904); *In re Pfahler,* 150 Cal 71, 88 P 270 (1906); *Bauch v. City of Cabool,* 148 SW 1003 (1912); *City of Santa Cruz v. Wykes,* 202 F 357 (9 Cir 1913); *Waugh v. Shirer, et al.,* 249 NW 246 (1933); *Robb v. City of Tacoma,* 28 P 2d 327 (1933); *Whiting Co. v. City of Burlington,* 175 A 35 (1934); *Varney v. City of Albuquerque,* 55 P 2d 40 (1936); *Robinson v. Payne,* 20 Cal App 2d 103, 66 P 2d 710 (1937); *Opinion to the Governor,* 58 A 2d 559 (1948); *City of Palm Springs v. Ringwald,* 52 Cal 2d 620, 342 P 2d 898 (1959); *State ex rel Witt v. State Canvassing Board,* 437 P 2d 143 (1968).

Especially note:

29 CJS, p. 33:

> "In all periods and in all countries it may be safely assumed that no privilege has been held to

be more exclusively within the control of governmental power than the privilege of voting, each state in turn regulating the subject by sovereign political will."

Whiting Co. v. City of Burlington, supra, p. 43:

"The rule of two-thirds vote, or of unanimous vote, can as reasonably be implied as that af majority vote."

Waugh v. Shirer, supra, pp. 247, 248, 249:

". . . section 1171-d4 . . . demands that it shall be carried . . . by at least 60 per cent of the total votes cast for and against the proposition."

* * * * *

"Nowhere in section 1171-d4, as argued by the appellant, is there granted privileges contrary to section 30, article 3, of the Constitution, to certain citizens, or classes of citizens, not offered upon the same terms to the appellant. The law applies uniformly and generally, not only to the citizens of Butler County, but to each county and the citizens thereof in the state of Iowa."

* * * * *

"There is nothing in the Constitution providing that a bond issue of the kind in question may be carried by a majority vote, as distinguished from the vote required in section 1171-d4."

Opinion to the Governor, supra, p. 559:

"In other words, in the absence of any constitutional provision to the contrary, the general assembly may provide in such act or resolution that approval of the question shall require the affirmative votes of a majority of all the quali-

fied electors voting in an election as distinguished from those voting only on the proposition itself; or it may provide that the affirmative votes of a majority of those electors actually voting on the particular proposition shall be sufficient to constitute an approval of the question. Of course in either of the above-mentioned provisions the general assembly may require more than a mere majority by providing, for example, that two-thirds or three-fifths or other major fraction of all the votes cast on the particular proposition shall be necessary to constitute such an approval."

State ex rel. Witt v. State Canvassing Board, supra, pp. 151, 155:

"Having disposed of the problem of the requirement of a two-thirds vote in every county we next note the question of whether there was compliance with the requirement of ratification by at least 'three-fourths of the electors voting in the whole state.' No serious attack is made on the constitutionality of this provision."

* * * * *

"The requirement of a two-thirds vote in each county being unconstitutional, and the demand of ratification by 'at least three-fourths of the electors voting in the whole state' having been met, the adoption of constitutional amendment submitted as Amendment No. 7 at the election held November 7, 1967 was accomplished."

Robinson v. Payne, supra, pp. 105, 107:

"A comparison of the statute with the Constitution reveals that the statute [Chapter 356, Statutes of 1935] allows an increase over the 5 per

cent limitation if a majority of the electors of the political subdivision involved authorize an increase, whereas article XI, section 20, of the Constitution requires a two-thirds vote."

* * * * *

"We are of the opinion, therefore, that chapter 356, Statutes of 1935, violates article XI, section 20, and is invalid, . . ."

City of Santa Cruz v. Wykes, supra, p. 364:

"By the Constitution of the State of California (section 18, article 11) it is provided:

* * * * *

"This is an inhibition against which a municipality cannot incur any indebtedness exceeding in any year the income and revenue provided for it for such year except in a certain mode or manner prescribed. The mode, therefore, becomes the measure of the power of the municipality to incur an indebtedness beyond the measure fixed by the fundamental law. That is to say, before the city can incumber itself with such excess indebtedness, it must have the consent of two-thirds of its qualified electors to that purpose, . . ."

Jarrolt v. City of Moberly, supra, p. 586:

"Considering the provision in this spirit, and looking at the evil to be prevented, we are of opinion that the issue by the defendant, of its bonds to purchase lands to be donated to the railway here, was a loan of its credit which could not be made without the assent of two thirds of the qualified voters of the city . . . The Act of March 18, 1870, must, therefore, be held to be in conflict with the Constitution of the State. It

authorizes a majority of the voters of a municipality to do that which the Constitution declares the Legislature shall not authorize to be done, except by the assent of two thirds of its voters."

II

THERE IS NO FEDERAL CONSTITUTIONAL RIGHT IN THE CITIZENS OF A POLITICAL SUBDIVISION OF THE STATE TO INCUR A BOND INDEBTEDNESS OR TO HAVE SUCH AN INDEBTEDNESS INCURRED BY A MAJORITY VOTE OR IN ANY PARTICULAR WAY.

The local government and its constituent electorate have only limited powers derived from the people of the state through their constitution and subject to their sovereign control under that fundamental law.

United States Constitution Amendment 10:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

California Constitution Article I, Section 2:

> "All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it."

In the case of *In re Pfahler, supra,* the Supreme Court of the State of California pointed out as follows, 88 P at p. 274:

> "It is clearly a question of local policy with each state what shall be its various political subdi-

visions for purposes of internal government, and what shall be the extent and character of the powers of those subdivisions and the manner of their exercise. The power of a state in such matters is absolute. (See *Claiborne v. Brooks,* 111 U.S. 400 [4 Sup. Ct. 489]; *Forsyth v. Hammond,* 166 U.S. 506 [17 Sup. Ct. 665].) Where the authority of the electors of a municipality or other subdivision of a state to directly legislate in a matter of purely local concern is denied by a state court, it is denied solely upon the ground that the state constitution or statutes forbid the exercise of such power, as in *Elliott v. Detroit,* 121 Mich. 611 [84 N.W. 820], and many cases cited by petitioner. (See Cooley on Constitutional Limitations, 7th ed. pp. 165, 166; Dillon on Municipal Corporations, sec. 44 and note.) The extent to which the people of a municipality shall be allowed to directly participate in the governmental function of legislating therefor in local or municipal affairs is therefore purely a question of state policy, in the determination of which the state is not restricted by any provision of the federal constitution. In thus speaking of the state, we mean not the legislature of the state, or the executive, or the judiciary, but the entire body of the people, who together form the body politic, known as the 'state.' (*Panhallow v. Doane's Admr.,* 3 Dall. 93 [Fed. Cas. No. 10,925]; *Brown v. State,* 5 Colo. 499.)"

In the case of *Whiting County v. City of Burlington, supra,* the Court noted that the city did not have an implied charter right to a majority vote as a municipal corporation in Vermont was a creature of the legislature possessing only such powers or rights as

were expressly granted to it by the legislature or as clearly implied in, or incident to, those expressly granted.

This limited nature of the power in the citizens of a political subdivision of the state with reference to their local government also found expression in the apportionment case of *Reynolds v. Sims,* 377 US 533 (1964), wherein the Court states as follows (p. 575):

> "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate government instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 US 161, 178, 52 L ed 151, 159, 28 S Ct 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.'"

Also see the case of *Detroit Edison Co. v. Township School Dist.,* 378 F 2d 225 (1967) (Cert. Den. 389 US 932), wherein it was alleged, inter alia, that a statute which permitted annexation and debt assumption proceedings was violative of due process and equal protection clauses of the 14th Amendment because the individual plaintiffs were denied the right to vote in an annexation proposal and their voting power was debased and diluted because they were compelled to

vote in common with other adversely interested electors on a debt assumption issue. The Court, after noting the power of governmental control of the state over its political subdivisions, stated (p. 229):

> "With respect to the annexation issue, plaintiffs' reliance on the relatively recent apportionment cases is misplaced. The Court in Reynolds v. Sims, 377 U.S. 533, 554, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1954), for example, recognized that 'all qualified voters have a constitutionally protected right to vote' (referring of course to the right to vote for a 'candidate of one's choice' in a 'representative government' system), and thus, the Court, relying on the equal protection concept, limited the states' power to disregard population in defining political boundaries for election purposes. However, as the District Court noted, the reapportionment cases 'create no constitutional rights in affected citizens concerning the *procedure* for creating or altering' any type of state district. The judgment of the District Court with respect to the annexation issue will hereinafter be affirmed; . . ." (Emphasis by the Court.)

III

THE PRESUMPTION OF CONSTITUTIONALITY IS SUFFICIENT OF ITSELF TO SUPPORT THE CONSTITUTIONALITY OF THE SUBJECT EXTRA-MAJORITY VOTE REQUIREMENTS.

In 16 CJS page 443, the presumption principle is stated as follows:

> "In order to justify a court in pronouncing a provision of the State Constitution to be in contravention of the Constitution of the United

> States the case must be so clear as to be free from all doubt; and an amendment of a State Constitution must be presumed not to be in conflict with the organic law unless the contrary is made to appear, every presumption of law and fact being indulged in favor of the legality of such amendment, unless the contrary is made clearly manifest. The onus is on one who contests a provision or the organic law of a state to prove the nullity thereof to the exclusion of every reasonable hypotheses."

The application of this principle is especially compelling here in view of the political and judicial sanction universally accorded the extra-majority requirement in the nation's history and the extensive and vital role it occupies and has occupied in the conduct of this nation's governmental institutions.

The rationality of the requirement in connection with the incurrence of long range governmental indebtedness is manifest from the nature of the requirement itself and the judgment of the sovereign people of the state as to its necessity in such connection should be deemed conclusive. This is an economic and fiscal concern of the state and as this Court has heretofore observed "Certainly this court will not interpose its own economic views or guesses when the state has made its choice." (*Safeway Stores v. Oklahoma Retail Grocers Assn.*, 360 US 334, 341 (1959).

The rationality and necessity of such a restriction in the promotion of the fiscal and economic interests of the state can of course be demonstrated and in Cali-

fornia the state interest has been recognized and received judicial expression by the Courts, as follows:

San Francisco Gas Co. v. Brickwedel (1882), 62 Cal. 641, 642:

> "The system previously prevailing in some of the municipalities of the State by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted. The change was eminently wise. A somewhat similar provision in the old Constitution with respect to State indebtedness saved the people of the State a vast amount of money. (*People v. Johnson,* 6 Cal 503; *Nougues v. Douglass,* 7 id. 65.)"

McBean v. City of Fresno (1896), 112 Cal 159, 164, 44 P 358, 359:

> "In the constitutional provision under consideration the framers had in mind the great and ever growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenues of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers."

Garrett v. Swanton (1932), 216 Cal 220, 235, 13 P 2d 725, 731:

> "The constitutional provision involved is based on sound public policy. Arguments of convenience, of policy, or of present necessity, should not be allowed by loose construction to weaken the force or limit the extent of debt limit provisions."

City of Redondo Beach v. Taxpayers, etc. (1960), 54 Cal 2d 126, 131, 352 P 2d 170, 173:

> "The purpose of the constitutional protection of article XI, section 18, is to safeguard the general funds and property of a municipality from a situation whereby the holders of an issue of bonds could, at some time after the issuance thereof, force an unconsented-to increase in the taxes of, or foreclose on the general assets and property of the issuing public corporation to obtain payment of the principal or interest thereon."

Lagiss v. County of Contra Costa (1963), 223 Cal App 2d 77, 85, 35 Cal Rptr 450, 454:

> "This constitutional provision was enacted to prevent the improvident creation of inordinate debts which might be charged against taxpayers in ever increasing volume from year to year."

Thus, the interest of the state in the two-thirds rule basically lies in the especial effect of the bonded indebtedness in question and its long term and irrevocable restrictions on the will of the people, including future majorities and minorities who may oppose the indebtedness and its purpose and yet be bound by it, and also in its effect on the financial resources and solvency of the community and its ability to satisfy

future needs because of the cumulative strain imposed on the community's finances by such indebtedness.

The extra-majority vote requirement acts as a brake on the financing of public improvements by the bonding method of incurring long range indebtedness with its attendant, and, at the present time, astronomical interest requirements which benefit the investor and not the improvement. By the requirement the state seeks to insure that a representative public sentiment be satisfied as to the necessity for the improvement, its priority over other needed public improvements, that its effect on existing and future tax rates does not impair the solvency of the community and that the taxable property of the community can absorb its cost considering the total amount of public indebtedness then outstanding and the projections for future needs.

In an analysis of municipal indebtedness contained in an article in Volume 30, *Michigan Law Review* 833 (1932), the author, in noting the failure to control the evils attendant to long range indebtedness solely by the device of maximum limitations based on the assessed value of property in the jurisdiction, observed as follows (pages 837-838):

> "Then the financial crisis and economic depression of 1873 and 1874 brought out the fact that municipal borrowing had advanced beyond sane limits.
>
> "The reaction which followed resulted in most states in the creation of upper limits upon the borrowing power. Local government borrowings were limited to fixed percentages of assessed val-

uations. Sometimes such limitations were incorporated in constitutions, sometimes in statutes.

"It might seem that these limitations would suffice to guard against local extravagance and against the creation of unduly burdensome obligations. However, this has been far from the case. They have almost completely failed of accomplishing any good end.

"In the first place, limits upon total indebtedness are no guarantee whatsoever of the character of the expenditure within the proscribed limits. Municipal officials may borrow and spend as recklessly as the unconcerned electorate will permit up to the constitutional or statutory barrier. Limitations upon *quantity* of indebtedness have proved no safeguard of *quality* of municipal expenditures." (Emphasis by the author of the article.)

The extra-majority vote requirement serves to insure to the extent that it is possible to do so, the quality of the expenditure by requiring that a representative element of othe qualified electors of the community be convinced of its necessity, its wisdom, its financial feasibility and the financial ability of the community to bear the cost of the expenditure.

The majority vote would not achieve the fiscal and economic objectives of the state in controlling the bonded indebtedness of its political subdivisions. A majority vote on a bond proposition rarely represents the majority will of the qualified electors of the community. In the ten year period 1959-1969, the official records of the City and County of San Francisco show

that out of 27 bond proposals that received a majority vote on the proposal, only 4 represented a majority of the registered electors of the City and County and in some cases the majority vote represented less than 30 percent of the registered electors. The futility of such a vote is further demonstrated by studies that show that practically all bond proposals submitted would be affirmed by such a vote. Thus, a survey of bond elections conducted in the Cities of Los Angeles and San Francisco in the years 1950 to 1960 showed that 95 percent of all proposals received favorable majority votes although less than 50 percent were passed by the required two-thirds margin. (Starner, *General Obligation Bond Financing by Local Governments,* pp. 76-80 (University of California, Bureau of Public Administration, 1961).)

In California, as in other states, the property of the same taxpayer has a liability for city bonds, for county bonds, for special district bonds and it has a contingent liability for the bonds of the state. The ease with which bond proposals would pass under a majority vote would inevitably impose a cumulative burden on his taxable property that the taxpayer would be unable to absorb and would result in every evil sought to be precluded by the extra-majority vote requirement and in additional modern day evils not envisioned by the constitutional framers. The population of California increased from 850,000 in 1879 to a present population of approximately 19,600.000. There has been a corresponding tremendous increase in local political subdivisions of the state and other special

service governmental entities, all possessing power to encumber the taxable property of the state by the incurrence of long range bonded indebtedness and a proliferation of bond proposals from these multiple public entities would flood the bond market thus creating a highly competitive market with consequent sharp rises in interest requirements and the inability of some entities to market bonds. The result is a halt in public improvements under construction, a rise in unemployment and a generally adverse effect on the state's economy. The extra-majority vote requirement tends to deter these disastrous consequences, whereas the majority vote requirement would invite them.

The foregoing basic exposition is addressed to the rationality, wisdom and necessity for the control by the state of the bonded indebtedness of its local political subdivisions. The reasons for such controls would amply satisfy a compelling state interest test if this were a case where such a justification were required. However, it is respectfully submitted for the reasons hereinafter discussed, that this is not such a case and that the compelling state interest justification is inapplicable.

IV

THE EXTRA-MAJORITY VOTE REQUIREMENT FOR THE INCURRENCE OF BONDED INDEBTEDNESS BY POLITICAL SUBDIVISIONS OF A STATE DOES NOT CONSTITUTE INVIDIOUS DISCRIMINATION. THE ONE MAN, ONE VOTE CONCEPT IS NOT APPLICABLE IN SUCH CASES.

In a series of decisions including the reapportionment decisions, this Court has held that under the circumstances of the particular cases considered, dilu-

tion or denial of voting rights by reasons of factors of race, residence, wealth, occupation or failure to possess a status such as parenthood or property ownership constituted invidious discrimination violative of the Equal Protection Clause of the 14th Amendment. (See: *Gray v. Sanders,* 372 US 368 (1963) (residence); *Reynolds v. Sims,* 377 US 533 (1964) and a series of reapportionment decisions (residence); *Carrington v. Rash,* 380 US 89 (1965) (occupation and residence); *Harper v. Virginia Bd. of Elections,* 383 US 663 (1966) (wealth); *Avery v. Midland County,* 390 US 474 (1968) (residence); *Kramer v. Union Free School Dist.,* 395 US 621 (1969) (parenthood and property ownership); *Cipriano v. Houma,* 395 US 701 (1969) (property ownership).)

In *Gray v. Sanders, Avery v. Midland County, Reynolds v. Sims,* and other reapportionment cases, all involving the equal representation per equal population principle, the Court evolved and applied the one man, one vote concept. In the balance of the cited cases the Court did not discuss this concept but found an exclusion from the voting franchise which constituted invidious discrimination in the absence of a showing that such exclusion was necessary to promote a compelling state interest.

In another series of decisions where dilution or denial of voting rights was asserted on the equal population principle and otherwise, the Court found no invidious discrimination and refrained from applying, or specifically rejected the application of the one man, one vote concept. (See: *Forston v. Dorsey,* 379

US 433 (1965); *Forston v. Morris,* 385 US 231 (1966); *Sailors v. Kent Board of Education,* 387 US 105 (1967); *Dusch v. Davis,* 387 US 112 (1967); *McDonald v. Bd. of Election Comrs. of Chicago,* 394 US 802 (1969); *Detroit Edison Co. v. Township School Dist.,* 378 F 2d 225 (1967) (cert. den.), 389 US 932.)

From these decisions by this Court, two legal patterns clearly emerge in voting cases. One is that in voting for representation in legislative assemblies, equal protection demands that equal population receive equal representation without regard to race, sex, economic status or place of residence, in short, in such cases, one man, one vote. The other is that exclusions from the voting franchise will be rigidly scrutinized by this Court and unless found necessary to promote a compelling state interest, such exclusions will be stricken as being violative of equal protection guaranties.

Another subsidiary legal pattern that clearly emerges from the decisions is that the one man, one vote concept is a confined concept and is not a judicial instrument to be indiscriminately used or applied in voting cases irrespective of the situation examined by the Court and this is where the Court below fundamentally erred. Thus, the Court states 170 SE 2d, page 790:

> "We are of the opinion that the one person one vote principle is now firmly established in broad general terms without qualification or exception."

This statement by the West Virginia Court was made in disregard of this Court's own discriminating

inclusionary and exclusionary application of the principle and also in disregard of this Court's caveats with reference to particular applications of its general pronouncements as expressed in *Gomillon v. Lightfoot*, 364 US 339 at page 344 (1960):

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

And in *Baker v. Carr*, 369 US 186 at page 217 (1962):

> "The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging."

As Mr. Justice Holmes once observed, "General propositions do not decide concrete cases." (*Lochner v. New York*, 198 US 45, 76 (1905).) The ultimate test under the Equal Protection Clause is whether a person has been in fact denied as a person the equal protection of the law. Discrimination in the law against persons which reflects no policy but which is arbitrary and capricious, and hence invidious, violates the Equal Protection Clause. However, when a voting law treats all persons subject to its terms equally as persons, there can be no invidious discrimination or denial of equal protection and the one man, one vote

instrument has no utility in the particular case. That is the situation here.

As this Court is thoroughly aware, the historical background and the circumstances of its adoption reveal the basic intendment of the Equal Protection Clause was to insure that persons would not be discriminated against or be subjected to oppressive treatment because of their race. And the rational development of that protection throughout the years brought within its orbit all governmental laws or actions whereby persons are discriminated against because of the possession of attributes, qualities or relationships by which persons are identified, distinguished and classified, such as race, creed, sex, residence, economic status, occupation, or association. But there is no such classification of persons or discrimination against persons or groups of persons involved in this case, either directly and obviously or sophisticatedly.

Neither the subject provisions of the Constitution and statutes of the State of West Virginia or of the State of California deny any person the right to vote and each vote is fully counted. In a semantic sense but certainly not in any invidiously discriminatory sense, there is weighting of votes under an extra-majority vote requirement, just as there must be weighting of votes under a majority vote requirement if a result is to be achieved. Thus, when 10 persons vote, 7 votes are required to affirm in a two-thirds vote requirement, 6 votes in a three-fifths vote requirement and also 6 votes in a majority vote re-

quirement. If 5 persons vote "yes" and 5 persons vote "no," the "no" vote is accorded full weight and the "yes" vote is accorded no weight at all under all three vote requirements even though the votes are equal. But no person's vote is weighted because he is a particular person or because he possesses or fails to possess particular attributes, qualities, status, or associations or because he resides in a certain place. The law is completely neutral as to these factors and as to persons, and each person votes under the law equally subject to its advantages and disadvantages. The Equal Protection Clause does not guaranty any person or group a right to prevail in a bond election and a law that operates indiscriminately sometimes in favor of some persons and sometimes in favor of others does not violate either the letter or spirit of the Clause.

What is involved here is simply a required procedural step in the process of the incurrence of long range indebtedness by the political subdivisions of the state, a matter that vitally affects the fiscal and economic interests of the state as a whole and one that is completely subject to the control of the sovereign people of the state who could grant the privilege to the local entities or withhold it at will. And the method of control adopted is, by that governmental mechanism which as observed by the Supreme Court of the State of Idaho in *Bogert v. Kinzer, supra,* "lies at the very foundation of our government."

The extra-majority vote requirement is not a mechanism of government conceived in prejudice or

sophisticatedly cloaked to conceal discriminatory evils. It is rather a method of governmental control against precipitate, impulsive and improvident majority action so universally adopted in wisdom and good faith by persons without malevolent intent and so permeative of our democratic governmental structure and so uniformly sustained by the judiciary that it is startling that it is now even suspect. It is not argued that mere historical existence determines equal protection concepts. But it is argued that it would take a strong and convincing demonstration that a method of voting which has historically and universally permeated our laws and judicial system for the past almost 200 years does now, at this time, constitute invidious discrimination. No decision of this Court compels this conclusion and no such demonstration was made in the Court below, nor could it be, as the simple fact is that there is no invidious discrimination and no denial of equal protection of the law under the subject constitutional and statutory provisions.

The principles determinative of this case are those adopted by this Court in the case of *McDonald v. Bd. of Election Comrs., supra,* wherein the Court stated as follows, 394 US pp. 807, 808, 809:

> "Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the

fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. . . . Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. We are then left with the more traditional standards for evaluating appellants' equal protection claims. Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See McGowan v. Maryland, 366 US 420, 6 L Ed 2d 393, 81 S Ct 1101 (1961); Kotch v. Board of River Port Pilot Commissioners, 330 US 552, 91 L Ed 1093, 67 S Ct 910 (1947); Lindsley v. Natural Carbonic Gas Co., 220 US 61, 55 L Ed 369, 31 S Ct 337 (1911)."

V

CONCLUSION

For the reasons herein set forth, it is respectfully submitted that this Court should reverse the judgment of the Supreme Court of Appeals of West Virginia which held that the three-fifths vote requirement of Article X, Section 8 of the Constitution of West Virginia and Sections 4 and 14 of Article 1, Chapter 13, Code, 1931, as amended, and also the sixty percent requirement of Article X, Section 1 of the Constitution of West Virginia and Section 16 of Article 8, Chapter 11, Code, 1931, as amended, to be in conflict with and violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Dated, San Francisco, California,
May 18, 1970.

Respectfully submitted,

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City Attorney of the City and County of San Francisco,
Attorney for Amicus Curiae City and County of San Francisco, State of California.

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(Appendices Follow)

PROPOSITIONS SUBMITTED TO VOTERS—Con

County	PROPOSITION 3 — OPEN SPACE CONSERVATION. Legislative Constitutional Amendment. Authorizes Legislature to define open space lands; provide restrictions to use thereof for recreation, scenic beauty, natural resources, or production of food or fiber; and establish basis of assessment of such lands.		PROPOSITION 4 — INDEBTEDNESS OF LOCAL AGENCIES. Legislative Constitutional Amendment. Provides that instead of a two-thirds vote to incur an indebtedness at an election held for that purpose, any local general obligation bonds for library purposes or public school purposes, may be approved by sixty percent of the qualified electors voting on such proposition at a primary or general election, including this election.	
	Yes	No	Yes	No
	213,553	103,223	153,665	155,383
	104	71	92	79
	2,329	1,548	1,645	2,097
	16,913	14,926	14,732	17,154
	2,349	2,007	1,653	2,596
	2,206	1,201	1,290	2,003
Costa	111,849	57,170	80,607	83,575
Norte	1,346	2,536	1,364	2,370
	6,540	5,656	4,715	7,227
	66,940	39,723	49,854	56,242
	3,393	2,167	2,268	3,169
	10,137	16,548	12,294	13,878
	8,551	6,167	5,859	8,526
	2,249	2,437	1,877	2,666
	50,210	35,972	32,408	51,795
	8,269	5,307	6,416	6,836
	4,034	2,835	2,722	3,973
	2,782	1,928	1,934	2,700
	972,173	953,937	883,041	1,006,077
	5,997	4,366	4,574	5,502
	44,666	20,508	29,569	33,948
	1,188	1,102	1,012	1,244
	6,908	6,367	4,927	8,006
	12,820	7,274	9,687	10,078
	1,139	1,166	904	1,298
	665	601	557	665
	36,191	15,488	27,505	22,559
	16,310	8,539	10,151	13,915
	5,251	3,873	3,856	4,995
	162,975	190,264	152,173	191,029
	13,832	8,659	9,409	12,866
	2,535	1,753	1,822	2,323
	67,221	44,150	52,210	56,856
	120,650	67,092	86,905	100,620
	3,256	1,367	1,342	3,173
Benito	69,764	90,919	74,603	82,383
Bernardino	187,066	159,372	182,263	158,510
Diego	138,990	79,846	103,623	110,626
Francisco	48,133	27,780	32,865	42,019
Joaquin	12,818	15,072	12,432	14,913
Luis Obispo	98,264	74,230	76,187	93,320
Mateo	41,825	27,661	29,803	37,776
Barbara	160,785	101,274	114,331	144,512
Clara	22,020	14,645	16,436	19,996
Cruz	13,663	9,520	8,786	13,869
	546	360	409	443
	6,296	4,065	4,738	5,218
	22,129	15,838	19,673	17,622
	35,850	20,875	25,258	30,647
	28,035	19,352	26,070	21,407
	5,600	5,596	3,862	7,072
	5,123	3,276	3,214	4,859
	1,160	1,425	985	1,516
	26,674	16,518	19,163	23,100
	3,409	3,242	2,699	3,784
	39,049	42,283	36,469	42,709
	15,305	6,698	10,863	10,812
	4,100	4,162	2,944	5,117
	2,974,135	2,381,937	2,462,715	2,789,653

Appendix B

SECTION 26 OF THE CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO

"The city attorney shall be an elective officer and shall receive an annual salary of ten thousand dollars ($10,000). He shall furnish an official bond in the sum of ten thousand dollars ($10,000). He shall appoint and at his pleasure may remove, all assistants and employees in his office. He shall devote his entire time and attention to the duties of his office. He must, at the time of his election, be an elector of the city and county, qualified to practice in all the courts of this state, and he must have been so qualified for at least ten years next preceding his election. [*Salary of city attorney now subject to Section 151.1.*]

"The city attorney must represent the city and county in all actions and proceedings in which it may be legally interested, or, for or against the city and county, or, any officer of the city and county in any action or proceeding, when directed so to do by the supervisors, except where a cause of action exists in favor of the city and county against said officer. Whenever any cause of action exists in favor of the city and county, the city attorney shall commence the same when within his knowledge or when directed so to do by the supervisors. He shall give his advice or opinion in writing to any officer, board or commission of the city and county when requested. Except as otherwise provided in this charter, he shall not settle or dismiss any litigation for or against the city and

county, unless, upon his written recommendation, he is ordered so to do by ordinance.

"The city attorney shall prepare, or approve as to form, all ordinances before they are enacted by the supervisors. He shall approve, by endorsement in writing, the form of all official or other bonds required by this charter or by ordinance before the same are submitted to the proper commission, board or office for final approval, and no such bonds shall be finally approved without such approval as to form by the city attorney. Except as otherwise in this charter provided, he shall prepare in writing the draft or form of all contracts before the same are executed on behalf of the city and county. He shall examine and approve the title of all real property to be acquired by the city and county.

"He shall keep on file in his office copies of all written communications and opinions, also all papers, briefs and transcripts used in matters wherein he appears; and books of record and registers of all actions or proceedings in his charge in which the city and county or any officer or board thereof, is a party or is interested."